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ELASTICSEARCH, INC. and
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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **OAKLAND DIVISION**

13
14 ELASTICSEARCH, INC., a Delaware
corporation, and ELASTICSEARCH B.V., a
15 Dutch corporation,

16 Plaintiffs,

17 v.

18 FLORAGUNN GmbH, a German corporation,
19 Defendant.

Case No. 4:19-cv-05553-YGR (AGT)

**PLAINTIFFS ELASTICSEARCH, INC.
AND ELASTICSEARCH B.V.'S REPLY
IN SUPPORT OF MOTION FOR
SANCTIONS AGAINST FLORAGUNN
REGARDING HENDRIK SALY**

Judge: Hon. Yvonne Gonzalez Rogers
Magistrate Judge: Hon. Alex G. Tse

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22 **PUBLIC REDACTED VERSION**
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1 I. INTRODUCTION

2 floragunn's Opposition ("Opposition" or "Opp.") to Elastic's Motion for Sanctions
 3 Regarding Hendrik Saly ("Motion" or "Mot.") contains a key admission: floragunn's co-CEO
 4 admits that floragunn possessed a key [REDACTED] by mid-February 2021 but floragunn did
 5 not provide that [REDACTED] to its counsel until March 15, 2021. Thus, floragunn (the party)
 6 withheld that [REDACTED] from its own counsel for a month while Elastic and floragunn
 7 negotiated and finalized the stipulation that was premised on Mr. Saly's unavailability to be
 8 deposed. Dkt. 76 (the "Saly Stipulation"). That [REDACTED] Mr. Saly to return to
 9 work, and he was available to be deposed at that time. floragunn's deception of Elastic, this
 10 Court, *and its own counsel* constitutes bad faith warranting sanctions.

11 floragunn's deception has prejudiced Elastic. Mr. Saly is *the* key witness in this case and
 12 is the author of 12 out of the 19 code segments that Elastic has accused of infringement. Mot. Ex.
 13 A. Moreover, Mr. Saly is a damaging witness for floragunn: Mr. Saly admitted to decompiling
 14 Elastic binaries to understand how Elastic's code worked while Mr. Saly was developing the
 15 product that would eventually become Search Guard. Mot. Ex. CC 33:3-21. Already, floragunn is
 16 attempting to use Mr. Saly's unavailability to its advantage by claiming that Mr. Saly's admission
 17 of decompiling is inadmissible hearsay. Dkt. 160 at 5-6.

18 Issue sanctions are a proper remedy, tailored to correcting the prejudice to Elastic that
 19 floragunn's bad faith conduct has caused. The Court should grant Elastic's Motion and order the
 20 jury instructions that Elastic requests.

21 II. ARGUMENT

22 A. Legal Standard

23 floragunn advocates for a legal standard that would require the Court to find that
 24 floragunn acted in bad faith or in willful disobedience of a court order when it deceptively
 25 withheld Mr. Saly's deposition. *See* Opp. 10 (citing *Am. Unites for Kids v. Rousseau*, 985 F.3d
 26 1075, 1090 (9th Cir. 2021)). Elastic has demonstrated floragunn's bad faith in deceptively
 27 shielding Mr. Saly from deposition and then, as soon as Elastic raised the issue of floragunn's
 28 deception, firing him to ensure he would be outside of floragunn's power. Even under floragunn's

1 bad faith standard, the Court should grant Elastic's Motion.

2 However, Elastic need not show bad faith for its Motion to succeed. floragunn has
 3 effectively spoliated Mr. Saly's testimony by deceptively withholding his deposition and then
 4 firing him. In fact, it is difficult to imagine what more would be required to show spoliation of
 5 oral evidence than the acts undertaken by floragunn. As such, Elastic need only show that
 6 floragunn willfully prevented Mr. Saly's testimony and had notice that Mr. Saly's testimony was
 7 potentially relevant to this litigation. *See Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993)
 8 ("[A] finding of bad faith is not a prerequisite to this corrective procedure. Surely a finding of bad
 9 faith will suffice, but so will simple notice of potential relevance to the litigation.") (internal
 10 quotation marks and citations omitted); *see also Lofton v. Verizon Wireless (VAW) LLC*, 308
 11 F.R.D. 276, 287 (N.D. Cal. 2015) ("Sanctions for spoliation arise where a litigant (1) had a duty
 12 to preserve documents in its control; (2) destroyed documents with a culpable state of mind; and
 13 (3) a reasonable trier of fact could find that the destroyed document was relevant.") (internal
 14 quotation marks omitted). The proof here also meets those standards.

15 floragunn is incorrect that *America Unites for Kids* "squarely addresses the issue" in this
 16 motion. Opp. 11. *America Unites for Kids* involved the wrongful *acquisition* of evidence, not its
 17 spoliation. *Am. Unites for Kids*, 985 F.3d at 1085. Wrongful acquisition of evidence does not
 18 frustrate the truth-seeking function of the courts; rendering witness testimony unavailable does. In
 19 the context of this dispute, the spoliation cases that Elastic cites are substantially more on point.
 20 *See, e.g., Glover*, 6 F.3d at 1329; *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982
 21 F.2d 363, 368–69 (9th Cir. 1992); *Christoffersen v. Malhi*, No. CV-16-08055-PCT-JJT, 2017 WL
 22 2653055, at *2, *5 (D. Ariz. June 20, 2017). Spoliation is much more analogous to floragunn's
 23 behavior than the behavior found in the cases floragunn cites. *See, e.g., Evon v. L. Offs. of Sidney*
 24 *Mickell*, 688 F.3d 1015, 1035 (9th Cir. 2012) (failing to file confidential information under seal);
 25 *Zambrano v. City of Tustin*, 885 F.2d 1473, 1483-84 (9th Cir. 1989) (failure to seek admission to
 26 local district court bar); *Cakebread v. Berkeley Millwork & Furniture Co.*, 218 F. Supp. 3d 1040,
 27 1041 (N.D. Cal. 2016) (attorney misrepresenting his identity to obtain evidence); *Koninklijke*
 28 *Philips N.V. v. Elec-Tech Int'l Co.*, No. 14-CV-02737-BLF, 2015 WL 6449399, at *1-*2 (N.D.

Cal. Oct. 26, 2015) (violation of agreement to follow model protective order); *cf. Lofton v. Verizon Wireless (VAW) LLC*, 308 F.R.D. 276, 286–87 (N.D. Cal. 2015) (applying different standards to concealment of the existence of later discovered evidence (bad faith) and to destruction of evidence (spoliation standard)). Nevertheless, Elastic has demonstrated floragunn’s bad faith, and the Court should order the requested sanctions even under the *America Unites for Kids* standard that floragunn advocates.

B. floragunn Acted in Bad Faith by Using Deception to Withhold Mr. Saly’s Deposition.

floragunn’s Opposition does not rebut Elastic’s showing that floragunn acted in bad faith when it deceived Elastic to enable the withholding of Mr. Saly’s deposition. floragunn knew by mid-February that a January 28, 2021 [REDACTED] Mr. Saly to return to work as of January 27, 2021. *See* Opp. 8; Mot. Ex. L. But floragunn hid this fact from Elastic—and from its own counsel—for a month, *see* Opp. 8, while telling Elastic that it expected to receive [REDACTED] [REDACTED] certifying Mr. Saly’s unavailability to work after January 27, 2021. floragunn then acted in further bad faith when it terminated Mr. Saly’s employment—apparently attempting to limit the Court’s investigative and remedial options—after Elastic began to meet and confer with floragunn regarding its withholding of Mr. Saly.

1. floragunn knew the January 28 [REDACTED] Mr. Saly to return to work.

floragunn argues that the January 28, 2021 [REDACTED] “says nothing” about Mr. Saly having been [REDACTED] to return to work. Opp. 7. But floragunn could not have believed in good faith that the January 28 [REDACTED] did anything other than establish that Mr. Saly’s [REDACTED] ended on January 27, 2021. Mr. Saly’s [REDACTED] determined *on January 28*—a Thursday—that Mr. Saly’s “[REDACTED]” had been *January 27*—the day before. Mot. Ex. L. floragunn offers no explanation for why the phrase “[REDACTED]” should be understood to mean the opposite: that Mr. Saly [REDACTED]. Nor does floragunn explain how the January 28 [REDACTED] could be anything other than [REDACTED]—particularly when [REDACTED] on December 10, 2020 that Mr. Saly was [REDACTED] through January 27, 2021 was the same [REDACTED] who on January 28, 2021 certified

1 January 27, 2021 as the [REDACTED]. Contrary to floragunn’s argument, Opp. 8, Elastic
 2 need not obtain German [REDACTED] expert opinion to “interpret[]” this plain language. There is no
 3 ambiguity, and the terms of the [REDACTED] are as simple as they are clear: on January 28, Mr.
 4 Saly’s [REDACTED] certified that Mr. Saly’s purported [REDACTED] ended on January 27.
 5 floragunn has no answer for this fact.

6 Instead, floragunn offers multiple ineffective arguments for why that fact should be
 7 ignored. First, floragunn suggests that the January 28 [REDACTED] was unremarkable, because Mr.
 8 Saly had previously provided [REDACTED] after the “[REDACTED]” had
 9 passed. *See* Opp. 8. But this is irrelevant, because no prior [REDACTED] stated that Mr. Saly was
 10 [REDACTED] to work. *See* Mot. Exs. D, E, and N. Indeed, the January 28 [REDACTED] was
 11 unlike any other that Mr. Saly had previously provided because the “[REDACTED]
 12 [REDACTED]” date (January 27) was *before* the determination and issuance dates (January 28). *See* Mot.
 13 Ex. L. This means that on the day Mr. Saly received [REDACTED]—January 28—he was already
 14 [REDACTED] to work. That Mr. Saly later sought [REDACTED] to try to avoid the
 15 consequences of having been [REDACTED] to work—that is, testifying at deposition—does not
 16 change this fact. *See* Mot. Exs. Q and R.

17 Second, floragunn suggests that Elastic did not believe the January 28 [REDACTED]
 18 Mr. Saly [REDACTED] to work because Elastic did not “immediately” raise its concern with floragunn
 19 and the Court upon receipt of the January 28 [REDACTED] on March 16, 2021. *See* Opp. 8-9. But
 20 Elastic had no way to know what other [REDACTED] floragunn had before floragunn produced
 21 them. For instance, it was possible that another [REDACTED] Mr. Saly on or before
 22 January 28 and had [REDACTED] extending after that date. In fact, on
 23 March 19, 2021, floragunn produced a contemporaneous [REDACTED] (in the same format
 24 as the others) showing Mr. Saly’s unavailability for a three-day gap period in *December 2020*.
 25 Opp. 4 (noting the production of DEF047708). In that context, it was perfectly reasonable for
 26 Elastic to believe floragunn that a [REDACTED] for the period after January 27 would be
 27 forthcoming. Elastic had repeatedly inquired about [REDACTED] for the period after January 27; in
 28 response, floragunn falsely and repeatedly told Elastic there was no cause for concern:

- 1 • In the same March 16, 2021 email in which it produced the January 28 [REDACTED], floragunn's
2 counsel represented that a [REDACTED] covering part of the period between January 28, 2021
3 and February 16, 2021 (the "Gap Period") would be provided: "[REDACTED]
4 [REDACTED]
5 [REDACTED] See Mot. Ex. N (emphasis added).
- 6 • On February 5, 2021, Elastic requested that floragunn provide Mr. Saly's [REDACTED]
7 for periods after January 27, 2021. Mot. Ex. J. On February 9, 2021 floragunn's counsel wrote
8 that [REDACTED]
9 [REDACTED]" Mot. Ex. K (emphasis added).
- 10 • At a meet-and-confer between the parties on February 9, 2021, floragunn's counsel stated that
11 it would shortly send a [REDACTED] covering the Gap Period. Declaration of James Rothstein in
12 Support of Plaintiffs' Reply in Support of Motion For Sanctions Against floragunn
13 ("Rothstein Decl.") ¶ 2. Elastic's counsel emailed floragunn's counsel to confirm this
14 statement, writing: "We understand that there are [REDACTED] establishing Hendrik
15 Saly's [REDACTED] that extend past January 27, 2021, and we understand that you will update us
16 if you do not receive those [REDACTED] by this Thursday." Rothstein Decl. Ex. 1. Elastic's
17 counsel added: "If I have misunderstood anything, please advise me as soon as possible." *Id.*
18 floragunn's counsel corrected several points but did not correct that "there are [REDACTED]
19 [REDACTED] establishing Hendrik Saly's [REDACTED] that extend past January 27, 2021." *Id.*
20 floragunn's counsel followed up that Thursday explicitly referring to the [REDACTED] as if it
21 existed, and referenced related "PII issues" but no other issues. *See* Rothstein Decl. Ex. 2.
22 Any delay in acting on the January 28 [REDACTED] was caused by Elastic's reliance on these
23 assurances. It was only after floragunn's continued failure to produce such a [REDACTED] that
24 Elastic realized floragunn's deception.

25 Third, floragunn is also incorrect that the later April 12 and May 20, 2021 letters support
26 that Mr. Saly was unavailable during the Gap Period. *See* Opp. 17–19. These letters are deficient
27 both in form and timing. floragunn previously explained to the Court that that German law is
28 "unambiguous" that "[REDACTED] such as ones provided by Mr. Saly" (i.e., like the

January 28 [REDACTED] have “high evidential value” and are “presumed” to be “[REDACTED]” Dkt. 116 at 2–3. But the April 12 [REDACTED] and May 20 one-line letter from [REDACTED] are not certificates like the others provided by Mr. Saly and are entitled to no presumption of validity. *See id.*; Mot. Exs. Q and R. Further, Mr. Saly’s employment contract required him to submit [REDACTED]—not informal letters—to demonstrate his unavailability. *See* Mot. Exs. F and G. floragunn must have known that the April 12 and May 20 letters did not meet the requirements for establishing [REDACTED] to work. Nor can floragunn explain why neither letter indicates that it was based on a [REDACTED] Mr. Saly. *See* Mot. 6–7, 11, 13. In fact, floragunn seems to concede that the April 12 letter is of no value: floragunn fails to cite the letter in its Opposition and offers no defense of its various indicia of unreliability: [REDACTED] [REDACTED] *see* Mot. Ex. X, its questionable reliance on Mr. Saly’s own assertion [REDACTED] *see* Mot. Ex. Q, and its absurd claim that Mr. Saly [REDACTED]. *See id.*

Moreover, the retroactive issuance of the letters suggests that they did not result from a contemporaneous [REDACTED] of Mr. Saly that would accurately reflect [REDACTED] during the Gap Period. floragunn protests that Elastic “does not elaborate” why the May 20 letter’s issuance fifteen days after Elastic raised concerns with the Gap Period renders it “highly suspect.” Opp. 18. But the answer is simple and obvious: the timing of the letter suggests it was created solely to respond to Elastic’s request for a meet and confer rather than in the normal course of Mr. Saly’s [REDACTED] employment relationship with floragunn. *See* Mot. Exs. O and R. In other words, the letter was contrived in response to the threat of sanctions. floragunn offers no explanation for why [REDACTED] during the Gap Period until some three months later or would not use the legal certificate format that would have required her to state [REDACTED].

Finally, letters collected months after January 27 cannot justify floragunn’s misrepresentations to Elastic while Elastic was seeking Mr. Saly’s deposition and while the parties were negotiating the Saly Stipulation. floragunn knew when it received the January 28

1 [REDACTED] Mr. Saly and determined that [REDACTED] had
 2 officially ended on January 27. *See* Mot. Ex. L. Further, that same month, floragunn discussed
 3 with Mr. Saly a potential return to work and a potential [REDACTED] with him and floragunn's
 4 owners. Mot. Exs. AA 72:17-75:21 and V. With knowledge of Mr. Saly's changed [REDACTED] and
 5 work status, floragunn then misrepresented to Elastic and this Court that Mr. Saly was
 6 unavailable to testify in this matter. Letters issued months after this course of events cannot undo
 7 floragunn's culpable mental state at the time of the misrepresentation. [REDACTED] letter thus
 8 in no way renders this dispute "moot." *See* Opp. 19.

9 **2. floragunn acted in bad faith by deliberately withholding the January**
 10 **28 [REDACTED] from its own counsel and from Elastic**

11 By floragunn's own admission, floragunn withheld the January 28 [REDACTED] from its
 12 counsel (and thereby from Elastic) for a month during the very period in which the parties
 13 finalized and filed the Saly Stipulation. floragunn admits that it received the January 28 [REDACTED]
 14 in mid-February.¹ Opp. 8. floragunn therefore indisputably knew that Mr. Saly's "[REDACTED]
 15 [REDACTED]" had been January 27 while the parties were negotiating the Saly Stipulation
 16 between February 11 and February 22, 2021. *See* Mot. Ex. L; Mot. 5. But floragunn *failed to*
 17 *provide the January 28 [REDACTED] to its counsel until March 15, 2021.* *See* Opp. 8. floragunn thus
 18 withheld the January 28 [REDACTED] from its counsel for *one month*—a month during which Mr.
 19 Saly's availability to work was a key issue of discussion between the parties.

20 floragunn argues that production of the January 28 [REDACTED] was "not urgent" during the
 21 month-long delay. Opp. 8. That claim distorts reality. The January 28 [REDACTED] included novel
 22 information about Mr. Saly's status, floragunn received it when the parties were negotiating a
 23 stipulation concerning Mr. Saly's availability to be deposed, and floragunn withheld it from its
 24 counsel in the face of counsel's representations to Elastic that further [REDACTED] documentation would
 25 be produced. Because the [REDACTED] contradicted the entire premise of the parties' negotiations—
 26 that Mr. Saly was unavailable to be deposed—it was therefore both crucial and time-sensitive that

27 ¹ Mr. Kressin's present declaration provides no basis to contradict his October 28 deposition
 28 testimony that floragunn received most of Mr. Saly's [REDACTED] within a few days of his
 examinations. *See* Kressin Decl. ISO Opp. ¶ 4; Mot. Ex. M 742:23-743:13.

1 floragunn produce the [REDACTED]. The reasonable interpretation of this sequence of events is that
 2 floragunn withheld the [REDACTED] from its own counsel because it sought to hide the fact that Mr.
 3 Saly was available until after the Court had entered the Saly Stipulation. *See* Dkt. 76.

4 floragunn further argues that its delay in disclosing the January 28 [REDACTED] (including to
 5 its own counsel) was justified because Elastic's repeated requests for Mr. Saly's [REDACTED]
 6 [REDACTED] covering periods after January 27 did not encompass the January 28 [REDACTED], which
 7 showed [REDACTED] *until* January 27. *See* Opp. 8. That argument fails for multiple reasons. First,
 8 Elastic had issued a request for production for *all documents supporting Mr. Saly's alleged*
 9 *unavailability*, Mot. Ex. H, RFP No. 103, floragunn had agreed on January 22, 2021 to produce
 10 any such documents, Mot. Ex. I, Response to RFP No. 103, and floragunn had an ongoing
 11 obligation under Federal Rule of Civil Procedure 26 to supplement its responses to that request.
 12 Second, Elastic's repeated informal requests to floragunn for additional [REDACTED] were phrased
 13 as requests for [REDACTED] establishing Mr. Saly's unavailability *after January 27* simply because
 14 floragunn had previously produced to Elastic [REDACTED] attesting to unavailability through
 15 January 27—not because floragunn was not obligated to provide other existing [REDACTED]. *See*,
 16 *e.g.*, Mot. Ex. J. The importance of the January 28 [REDACTED] was obvious to floragunn, and
 17 floragunn's deliberate withholding of it during a key period constitutes bad faith.

18 **3. floragunn acted in bad faith by deliberately misleading Elastic about**
 19 **forthcoming [REDACTED]**

20 floragunn now claims that, as of February 2021, “Mr. Saly’s unavailability going forward
 21 was unclear.” Opp. 25. This claim flatly contradicts floragunn’s contemporaneous representations
 22 to Elastic, and this attempt to rewrite history demonstrates floragunn’s inability to explain its bad
 23 faith conduct. By mid-February, floragunn possessed the January 28 [REDACTED] and knew that Mr.
 24 Saly had been [REDACTED] to work. *See* Opp. 8. Yet, over the course of February 2021,
 25 floragunn made numerous representations to Elastic and the Court that floragunn would provide
 26 [REDACTED] showing Mr. Saly’s unavailability during the Gap Period and that Mr. Saly
 27 continued to be unavailable for deposition. On February 9, 2021, floragunn’s counsel wrote to
 28 Elastic that “[REDACTED]”

1 [REDACTED]
 2 [REDACTED] Mot.
 3 Ex. K. The same day, Elastic memorialized floragunn’s statement at a meet and confer that “[REDACTED]
 4 [REDACTED]
 5 [REDACTED]”—and floragunn did not correct Elastic’s understanding. Rothstein Decl. Ex. 1. And, on
 6 February 22, the parties filed the Saly Stipulation, which confirmed that floragunn “has
 7 represented to plaintiffs that (a) additional documentation showing the basis for Mr. Saly’s leave
 8 for periods past January 27, 2021 is expected to be provided to defendant and will be provided to
 9 plaintiffs [and] (b) defendant does not anticipate that Mr. Saly will be able to return from leave to
 10 be deposed before March 19, 2021.” Eberhart Decl. ISO Mot. ¶ 15; Dkt. 76. floragunn’s
 11 argument that Mr. Saly’s condition “was unclear” as of February 2021, Opp. 25, therefore
 12 directly contradicts floragunn’s repeated representations to Elastic in February 2021 that
 13 floragunn did not expect Mr. Saly to be available to testify before fact discovery closed.

14 floragunn argues that it did not deceive Elastic because its representations on February 9
 15 and February 22 were technically true. *See* Opp. 15–16. For example, floragunn recounts that it
 16 rejected draft language in the Saly Stipulation that [REDACTED] because it had
 17 not seen the certificates, instead opting for language that it “expected” to receive such
 18 documentation. *See* Opp. 5–6. But floragunn’s representations were at a minimum misleading
 19 and, as to the company, knowingly false. At least by the week prior to the submission of that
 20 stipulation, floragunn—although not its counsel—had received the January 28 [REDACTED] and
 21 knew that Mr. Saly was no longer [REDACTED] *See* Opp. 8. As of mid-February, floragunn
 22 thus could not have “expect[ed]” in good faith that any [REDACTED] for the period after
 23 January 27 was forthcoming, *see* Mot. Ex. K, Dkt. 76, or that Mr. Saly could not “[REDACTED]
 24 [REDACTED] *See* Dkt. 76. floragunn acted in bad faith when it sat
 25 silent and withheld from its counsel the January 28 [REDACTED] while counsel negotiated the
 26 stipulation based on false premises.

27 4. Elastic timely and repeatedly sought Mr. Saly’s testimony.

28 floragunn makes the incredible argument that it was *floragunn* that wished for Mr. Saly to

1 testify and Elastic that was “eager to exclude him.” Opp. 13–14. Both propositions are false.
 2 floragunn relied on Mr. Saly to assist in its discovery efforts during Mr. Saly’s [REDACTED] in
 3 December 2020 and January 2021—floragunn consulted Mr. Saly to help with RFA responses
 4 regarding control of Mr. Saly’s GitHub account. *See* Mot. Exs. AA 106:13–108:13, DD, EE, and
 5 FF. But, despite being able to obtain information from Mr. Saly when it suited floragunn’s
 6 purposes, there is no evidence that floragunn tried to induce or compel Mr. Saly to testify.

7 And despite floragunn’s assertions that it had “no reason or incentive” to prevent Mr. Saly
 8 from testifying, *see* Opp. 1, it is simply implausible that floragunn wanted to expose Mr. Saly to
 9 questioning about key evidence supporting Elastic’s case: for example, his admission that he
 10 decompiled Elastic’s object code, *see* Mot. Ex. CC. 33:3-23, his admission on a public website
 11 that he had accessed relevant Elastic source code, *see* Rothstein Decl. Ex. 3, and the extensive
 12 indicia in code Mr. Saly “authored” showing that he copied from Elastic. *See, e.g.*, First Amended
 13 Complaint, Dkt. 23, ¶¶ 30, 33, 43, 47. floragunn’s month-long delay in producing the January 28
 14 certificate, its failure to make Mr. Saly available for deposition during the Gap Period, and its
 15 sudden termination of Mr. Saly in the course of the parties’ present dispute all further contravene
 16 floragunn’s claim. On the contrary, floragunn’s behavior is more consistent with an effort to
 17 *shield* Mr. Saly from deposition. Such an effort finds further support in floragunn’s similar
 18 behavior with respect to Mr. Bondarenko and Mr. Gustavsson, the second and third of the four
 19 authors of the infringing code. *See* Mot. 16.

20 floragunn also claims that Mr. Saly indicated that “he would very much like to cooperate
 21 in the deposition process” prior to [REDACTED] but that “[REDACTED]
 22 because “[REDACTED] Opp. 2. The (at least) double hearsay
 23 floragunn offers on this point provides no credible evidence that Mr. Saly in fact indicated that he
 24 wanted to be deposed. Mr. Rivkin’s declaration does not indicate that he spoke to Mr. Saly, and
 25 the phrasing strongly suggests that he did not. *See* Rivkin Decl. ¶ 4 (“I also explained that I was
 26 informed that he had indicated that . . .”). Nor does floragunn offer any support for the
 27 proposition that a deposition would be [REDACTED] or that he was [REDACTED]
 28 [REDACTED] not to appear. Notably, floragunn does not rely on nor defend in its Opposition the April 12

1 letter [REDACTED]

2 [REDACTED]. See Mot. Ex. Q.

3 Elastic's behavior, on the other hand, shows a persistent effort to depose Mr. Saly: Mr.
 4 Saly's deposition was the first deposition that Elastic, or any party, sought in this litigation.
 5 Rothstein Decl. ¶ 6. On November 25, 2020, Elastic conferred with floragunn pursuant to Civil
 6 Local Rule 30-1 to request a deposition date for Mr. Saly. See Mot. Ex. C.² The parties further
 7 conferred on November 30, 2020 regarding Mr. Saly's ability to be deposed. See Rothstein Decl.
 8 Ex. 4. On December 10, 2020, Elastic asked for "any indication regarding how long Mr. Saly will
 9 be unavailable and/or any update on the likelihood that he will be available to be deposed before
 10 the close of fact discovery[.]" *Id.* Elastic again asked via telephone on January 25, 2021 if Mr.
 11 Saly was available to be deposed. See Eberhart Decl. ISO Mot. ¶ 10. Also on February 19, Elastic
 12 issued a notice for Hendrik Saly's deposition on March 4, 2021. Rothstein Decl. Ex. 5. Elastic's
 13 counsel wrote: "Due to your ongoing refusal to provide a date for Mr. Saly's deposition despite
 14 our ongoing requests beginning in November 2020 for such a date, we have chosen March 4,
 15 2021. We remain available to meet and confer about scheduling for Mr. Saly's deposition." *Id.*

16 floragunn also argues that Elastic's present motion is "disingenuous flimflam" because its
 17 negotiating position regarding the Saly Stipulation shows that Elastic was "content not to have
 18 Mr. Saly deposed" at that time. See Opp. 14. floragunn states that "Elastic wanted to preclude Mr.
 19 Saly from testifying at trial if he could not testify during fact discovery even if his condition
 20 improved," rejected a proposal that "would have allowed Mr. Saly to be deposed after fact
 21 discovery expired [REDACTED]," and ultimately opted for "an agreement that Mr.
 22 Saly not be deposed in discovery and not assist floragunn's experts." Opp. 13-14. This is
 23 incorrect. First, floragunn misrepresents the parties' ultimate agreement: the Saly Stipulation does
 24 not preclude a future deposition; rather, it states that "should Mr. Saly become available to testify
 25 at trial, the parties will meet and confer in an effort to agree on *procedures that would eliminate*
 26 *prejudice to plaintiffs from Mr. Saly's late availability[.]*" Dkt. 76 at 3 (emphasis added). Because

27 ² The timing of Elastic's request was driven by floragunn's document productions: floragunn only
 28 began producing development documents and internal communications on September 18, 2020.
 Rothstein Decl. ¶ 7.

1 Elastic had no way to know what would occur over the remaining course of the litigation—
 2 including completion of fact discovery, expert discovery, potential summary judgment, and
 3 *Daubert* motion practice—Elastic was not willing to commit in February 2021 to the proposition
 4 that a deposition of Mr. Saly at some undetermined future date would cure the prejudice to
 5 Elastic. Rothstein Decl ¶ 10. Accordingly, Elastic insisted that the stipulation leave for later
 6 determination whether that prejudice could be cured by a deposition or other means. *Id.* ¶ 11.

7 Second, although the Saly Stipulation does prevent Elastic from moving to compel Mr.
 8 Saly's deposition, *see* Mot. 5, that clause in no way establishes that Elastic did not *want* to depose
 9 Mr. Saly. Faced with floragunn's [REDACTED] repeated representations that Mr. Saly would be
 10 on [REDACTED] throughout the fact discovery period, Elastic did not think the Court would order
 11 Mr. Saly to appear for deposition. Rothstein Decl. ¶ 12. Consequently, Elastic sought through the
 12 stipulation to avoid the prejudice that would arise if Mr. Saly remained beyond the reach of
 13 deposition but assisted floragunn's expert witnesses (as in fact it appears he did).

14 **5. floragunn Acted in Bad Faith When it Terminated Mr. Saly's** 15 **Employment**

16 floragunn offers a slew of explanations for why it fired Mr. Saly just a few weeks after
 17 Elastic first raised concerns about floragunn's misrepresentations. Opp. 19–24. None of these
 18 explanations has merit. The obvious explanation remains: having just been ordered to produce
 19 two other developers for depositions because they were floragunn's managing agents, Dkt. 97,
 20 and in the face of the joint discovery letter regarding floragunn's deception about Mr. Saly,
 21 floragunn decided to fire Mr. Saly to limit the Court's and Elastic's ability to obtain evidence
 22 regarding Mr. Saly's medical condition or his substantive knowledge related to the litigation.

23 floragunn claims that it could not be expected to "keep Mr. Saly as an employee
 24 indefinitely while [REDACTED] Opp. 19. But there is no evidence that Mr. Saly's
 25 employment needed to cost floragunn *anything* while [REDACTED] floragunn's
 26 payments of approximately [REDACTED] to Mr. Saly while Mr. Saly was [REDACTED] were
 27 *voluntary*. Dkt. 127 ¶ 13. And floragunn acknowledges that it had plenty of money, noting that its
 28 [REDACTED] [REDACTED] [REDACTED]—to

1 [REDACTED] Opp. 24. And floragunn offers no response to Elastic’s observation that
 2 floragunn’s financials show its business [REDACTED]. *See* Mot. 14.

3 floragunn argues that Elastic would have claimed an improper purpose no matter when
 4 floragunn terminated Mr. Saly, noting that floragunn kept Mr. Saly employed for 14 months of
 5 [REDACTED], including for all of fact discovery. Opp. 20, 21. floragunn claims this demonstrates
 6 “remarkable good faith” and a desire that Mr. Saly would become able to “assist floragunn in this
 7 litigation.” *Id.* 20. But if floragunn were really interested in retaining Mr. Saly’s employment due
 8 to its good faith, surely floragunn would have waited until the parties’ dispute regarding Mr.
 9 Saly’s purported unavailability had been resolved before firing Mr. Saly. Instead, floragunn fired
 10 Mr. Saly immediately after Elastic requested a meet and confer with floragunn on the issue.

11 floragunn further argues that the need to replace the [REDACTED] Sergii
 12 Bondarenko and Mikael Gustavsson, whom it calls “[REDACTED]
 13 required it to terminate Mr. Saly.”³ Opp. 20. This again ignores that floragunn’s payments to Mr.
 14 Saly during Mr. Saly’s leave were *voluntary*. floragunn could have “free[d] up some resources to
 15 go toward hiring a CTO,” Opp. 20, 22, without firing Mr. Saly. And floragunn’s claim that,
 16 absent Mr. Saly, Mr. Bondarenko, and Mr. Gustavsson, “[REDACTED]
 17 [REDACTED]” Opp. 20, is not consistent with the evidence.
 18 floragunn’s public repositories include *numerous* commits from persons other than Mr. Kressin,
 19 Mr. Bondarekno, and Mr. Gustavsson—for example, among many other committers, someone
 20 named “Nils Bandener” has made more than a thousand commits to the “search-guard-suite”
 21 repository and more than 1,500 commits to the “search-guard-suite-enterprise” repository from
 22 late 2019 to the present. *See* Walker Decl., Dkt. 213-1, ¶ 3, Ex. B.

23 The undisputed timeline overwhelms floragunn’s excuses for firing Mr. Saly when it did:
 24 On May 4, 2021, the Court ruled that Mr. Bondarenko and Mr. Gustavsson were managing agents
 25 of floragunn who must be produced for deposition. Dkt. 97. On May 5, 2021, Elastic requested a
 26 meet and confer with floragunn regarding floragunn’s misrepresentations about Mr. Saly’s

27 _____
 28 ³ Mr. Bondarenko and Mr. Gustavsson, of course, were terminated for failing to obey an order
 from this Court requiring their depositions. Opp. 20; Dkt. 100.

1 unavailability. Mot. Ex. O. On May 14, 2021, fact discovery closed with Mr. Bondarenko and Mr.
 2 Gustavsson having failed to appear for their scheduled depositions. Dkt. 100 at 4–5. On May 21,
 3 2021, floragunn gave Mr. Saly notice of his termination. Dkt. 127 ¶ 16. The only logical
 4 conclusion from this sequence is that floragunn anticipated that the Court would order some relief
 5 that would require Mr. Saly’s participation, just as the Court had done regarding Mr. Bondarenko
 6 and Mr. Gustavsson. floragunn thus fired Mr. Saly to limit the impact of any such relief.

7 **C. floragunn’s Deception Has Prejudiced Elastic**

8 floragunn tries to minimize the prejudice to Elastic from Mr. Saly’s false unavailability,
 9 claiming that the Saly Stipulation shows that Elastic was willing to forgo Mr. Saly’s deposition.
 10 Opp. 25. This is both false and a red herring. As shown above, Elastic persistently sought Mr.
 11 Saly’s deposition over the course of months. *See* § II.B.4, *supra*. And Elastic only agreed to the
 12 Saly Stipulation in reliance on floragunn’s representations that Mr. Saly had been and would
 13 continue to be unavailable. Elastic sought the Saly Stipulation in an attempt to prevent floragunn
 14 from using Mr. Saly to help its defense while shielding him from deposition. *See id.*

15 In fact, Elastic’s concerns that Mr. Saly would help floragunn’s litigation efforts while
 16 evading deposition were well founded. floragunn admits that it sought and obtained Mr. Saly’s
 17 assistance in responding to RFAs that Elastic served on December 23, 2020. Opp. 25 n.6.
 18 floragunn tries to minimize Mr. Saly’s assistance, but floragunn cannot rebut that it had the ability
 19 to obtain information from Mr. Saly when it chose to do so in early 2021. And, as Elastic’s
 20 pending motion regarding the Saly documents makes clear, there is evidence that input from Mr.
 21 Saly was used to inform the opinions of floragunn’s technical expert. *See* Dkt. 147.

22 floragunn also attempts to recast Elastic’s claim of prejudice as an untimely complaint
 23 about Mr. Kressin’s preparation as a Rule 30(b)(6) witness. *See* Opp. 25. Mr. Kressin did
 24 possesses inadequate information about the development of code that Mr. Saly authored. *See* Mot.
 25 Ex. B 120:24-149:10; Mot. Ex. AA 85:7-10. But the fundamental problem is that floragunn
 26 obstructed Mr. Saly’s deposition. Elastic was not required to permit floragunn to substitute
 27 30(b)(6) testimony for testimony from Mr. Saly. Even if Mr. Kressin had been adequately
 28 prepared, he could not provide the firsthand knowledge and ability to test credibility that Mr. Saly

1 would have brought to the deposition.

2 floragunn's attempt to minimize the prejudice to Elastic also entirely ignores that
 3 floragunn is already attempting use Mr. Saly's unavailability offensively. Mr. Saly made an out-
 4 of-court statement to Elastic's co-founder, Uri Boness, that Mr. Saly had decompiled Elastic's
 5 object code in the course of developing the software that would eventually become Search Guard.
 6 Mot. Ex. CC 33:3-21. In its *Daubert* motion to strike parts of Elastic's technical expert's
 7 testimony, floragunn argued that Elastic's expert cannot rely on this statement because it is
 8 hearsay.⁴ Dkt. 160 at 5-6. If Elastic had been able to depose Mr. Saly, Elastic would have been
 9 able to obtain direct testimony about Mr. Saly's decompilation of Elastic binaries (and further
 10 detail about that process). floragunn's attempt to weaponize Mr. Saly's unavailability by claiming
 11 Mr. Boness's testimony is hearsay highlights both the prejudice to Elastic and the strategic benefit
 12 to floragunn from Mr. Saly's unavailability.

13 **D. Issue Sanctions Are the Only Appropriate Remedy**

14 floragunn does not address the propriety of issue sanctions as a remedy for floragunn's
 15 bad faith conduct. Issue sanctions are the appropriate remedy. A late deposition cannot cure
 16 Elastic's inability to use Mr. Saly's deposition to inform other fact discovery, expert opinion
 17 development and discovery, and *Daubert* motions in this litigation. And issue sanctions regarding
 18 the code sections that Mr. Saly authored are tailored to righting the wrong caused by floragunn's
 19 bad faith. *See Am. Unites for Kids*, 985 F.3d at 1089. Accordingly, Elastic requests that the Court
 20 instruct the jury that (1) floragunn could have, but refused, to make Mr. Saly available for
 21 deposition; and (2) it is established that Mr. Saly accessed the infringed Elastic code and copied
 22 from Elastic the twelve specific accused floragunn code segments he "authored."

23 **III. CONCLUSION**

24 For the foregoing reasons, Elastic respectfully requests that the Court grant the motion and
 25 issue the requested sanctions against floragunn.

26
 27
 28 ⁴ Elastic maintains that Mr. Boness's testimony is admissible. But Elastic remains prejudiced, because details and a direct admission from Mr. Saly would be more compelling.

1 Dated: November 29, 2021

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